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# Immigration Changes and Considerations in a Nearing Post-COVID-19 World


## As people start to return to the pre-COVID-19 way of life, it is important to reevaluate immigration practices to ensure they are in line with legal requirements.

**By Kate Kalmykov and Lizbeth Chow| July 14, 2021 | New Jersey Law Journal**

The Coronavirus Disease 2019 (COVID-19) pandemic has impacted immigration processes considerably over the past 18 months. Now that COVID-19 vaccines are broadly available and as people start to return to the pre-COVID-19 way of life, it is important to reevaluate immigration practices to ensure they are in line with legal requirements, and review issues that will continue to impact employment immigration in the months ahead.

**LCA Requirements**

Under INA §212(n)(1), H-1B employers must obtain a certification from the Department of Labor that it has filed a Labor Condition Application (LCA) before filing the I-129 petition for an H-1B employee. The LCA contains information on the occupation, the wage rate being paid to the beneficiary, the prevailing wage for the occupation in the area of intended employment, and the employee's specific work location(s). Material changes to employment, including changes in work location outside the area of intended employment identified on the LCA, require a new LCA and filing of an amended H-1B petition. Where an employee moves to a new worksite within the same metropolitan statistical area (MSA) or area of intended

employment covered by the initial H-1B petition, a new LCA and petition is not required, but the employer must still give notice of the H-1B employment at the new work location.

In response to the COVID-19 pandemic and in compliance with local social-distancing requirements, many employers relocated employees to remote work. For most employees, this meant working from home in locations within the same MSA or an area within normal commuting distance of the worksite identified on the LCA. However, the lengthy COVID-19 closures and remote work conditions enabled many employees to relocate to areas outside the MSA. Additionally, extended remote work conditions became a highly sought-after employment benefit. As such, some employers are considering offering continued remote work capabilities.

As employers return to pre-COVID operations, employers should audit existing LCAs and identify employees' actual and ongoing work location(s) to assess whether a new LCA/H-1B petition is required. If an employee will return to the prior work location but be permitted regular and consistent remote work capabilities, this should be reflected in a new LCA and H-1B petition (even if the remote work location is within the same MSA as on the LCA). This is particularly important as USCIS also returns to normal operations and begins to re-institute its Administrative Site Visit and Verification Program, where immigration officers conduct in-person compliance reviews to ensure petitioners and beneficiaries are following the terms and conditions of their petitions.

**I-9 Requirements**

Typically, under INA §274A(b), all employees hired must complete Form I-9 and produce documents establishing employment authorization and identity; employers must *physically* examine original employment authorization and identity documents and verify those documents on Form I-9 within *three* business days of hire before signing the Form I-9 attestation.

In March 2020, the U.S. Department of Homeland Security (DHS) introduced Form I-9 verification flexibilities in response to the physical-distancing precautions being implemented as a result of the COVID-19 pandemic. Accordingly, employers operating remotely have been permitted to conduct Form I-9 verification of employment eligibility documents *virtually*. Recently, DHS clarified that the requirement that employers inspect employees' Form I-9 documentation in-person applies only to those employees who physically report to work at a company location on any *regular, consistent, or predictable basis*. Employees hired on or after June 1, 2021, who work exclusively in a remote setting due to COVID-19-related precautions are temporarily exempt from the physical inspection requirements until they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier.

Once an employer's normal operations resume (or the termination of the Form I-9 flexibilities is announced), all employees onboarded using remote verification must report to their employer within *three business days* for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. As such, employers should monitor the DHS websites and announcements for updates on the Form I-9 flexibilities.

**Consular Update**

Due to the COVID-19 pandemic, U.S. Consulates worldwide closed in March 2020, and all routine visa services were suspended until July 2020 when a phased re-opening began. The delivery of the COVID-19 vaccines and falling case numbers at the end of 2020 brought hope that consular processing would return to normal operations, but this has not yet been the case.

Most consulates continue to provide emergency and mission critical visa services, but many consulates remain closed for routine services or are operating at a much-reduced capacity. The U.S. Consulates in India, Mexico, and the United Kingdom have recently announced new or extended service limitations. Moreover, the extended closures and processing limitations have created massive backlogs leading to appointment unavailability.

Accordingly, foreign nationals should expect significant delays in obtaining visa appointments, as well as the possibility that any scheduled appointments may be cancelled suddenly. It is crucial to understand the unpredictable nature of consular operations at this time and the significant risk that individuals may not be able to return to the U.S. as planned. Therefore, international travel is not recommended.

**Travel Ban and Visa Suspension Proclamation Update**

To curb the spread of COVID-19, President Trump issued two Presidential Proclamations which prohibited the entry of certain immigrants and nonimmigrants.

First, Presidential Proclamation 10014, entitled "Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak," was made effective April 23, 2020, and temporarily suspended the entry of *immigrants* who were outside of the U.S. on April 23, 2020, and did not have a valid immigrant visa on the effective date, and were not in possession of a valid travel document effective on or after the date of the temporary suspension, subject to enumerated exemptions. President Biden *rescinded* this proclamation on Feb. 24, 2021, and promulgated instructions for immigrant visa applicants who have not yet interviewed; who were previously refused; and 2020/2021 diversity visa applicants.

Second, Presidential Proclamation 10052, entitled "Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak," made effective June 24, 2020, extended Presidential Proclamation 10014 and also suspended the issuance of visas for those seeking entry pursuant to the following nonimmigrant classifications and their derivative family members: H-1B, H-2B, L-1A, L-1B, and certain J-1 nonimmigrants, subject to enumerated exemptions. On April 1, 2021, the Department of State announced that Presidential Proclamation 10052 had expired. Visa applicants were informed that those who were not interviewed or scheduled for an interview would have their applications prioritized and processed per existing phased resumption of visa services guidance; and those who were refused visas due to the restrictions of the proclamation could reapply by submitting a new application including a new fee.

Despite the rescission of Presidential Proclamation 10014 and expiration of 10052, and the State Department's announcements that visa processing would resume, the state of consular operations has continued to hinder visa processing. Further, the geographic COVID-19-related Presidential Proclamations 9984, 9992, 10143, and 10199, which suspend entry into the United States of foreign nationals who have been physically present in China, Iran, Schengen Region, United Kingdom, Ireland, Brazil, South Africa, and India, in the 14-day period before seeking entry into the U.S., *remain in effect*.

**National Interest Exemptions Update**

Throughout the COVID-19 emergency, the U.S. Department of State (DOS) has provided National Interest Exceptions (NIE's) to the COVID-19 Presidential Proclamations restricting entry from specific geographic regions. Most recently, the DOS expanded the criteria for NIE eligibility for purposes of exceptions to all four geographic proclamations, including: travelers providing executive direction or vital support for enumerated critical infrastructure sectors, or directly linked supply chains; and travelers providing vital

support or executive direction for significant economic activity in the U.S. The updated guidance expands eligibility criteria for high-level business executives travelling to the U.S. and appears to provide more flexibility for approval, but consular officers maintain wide discretion in determining whether the purported reason for travel should be exempted from the travel restrictions. Additionally, note that consulates are now requesting at least 60 business days to process NIE requests and NIEs are only valid for up to 30 days from the date of issuance, limiting the issuance and usability of NIEs.

**Conclusion**

New developments related to post-COVID immigration updates are announced frequently and can be nuanced. Continuing regular communication with immigration counsel during this time will ease navigating these near constant changes.



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